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In The Supreme Court of the United States

JALIL ABDUL-KABIR,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF FOR THE CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Child Welfare League of America, Juvenile Law Center and National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of petitioners, Jalil Abdul-Kabir and Brent Ray Brewer.[1]

INTEREST OF *AMICI CURIAE*

This Court has observed that "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984)). *Amici* believe that this goal of fairness and accuracy can best be achieved through the presentation of all relevant information – including that associated with adverse events and aspects of a defendant's childhood and adolescence – for full consideration by the fact finders in capital cases. The statements of *amici curiae* Child Welfare League of America, Juvenile Law Center, and National Association of Criminal Defense Lawyers are attached at Appendix A.

SUMMARY OF ARGUMENT

This Court's Eighth Amendment jurisprudence is characterized by a central unifying idea: that a capital sentencing jury's decision must reflect a "reasoned moral response" to the offender and his offense. To ensure such a response, this Court has required that the jury have

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. *See Penry v. Lynaugh*, 492 U.S. 721 (1998) (*Penry I*).

One category of evidence plainly relevant to that determination is that which chronicles abuse, neglect, violence and mental illness during childhood and adolescence. Both Mr. Abdul-Kabir[2] and Mr. Brewer[3] presented such evidence to the jury in mitigation of sentence. However, the former Texas capital sentencing statute, under which both petitioners were sentenced, made no mention of mitigating evidence and did not advise the sentencing jury to decide whether death was the appropriate sentence in light of all the evidence presented. Instead, the jury in the case of each petitioner was restricted to narrow determinations regarding the "deliberateness" of the

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[2] *See Cole v. Dretke*, 418 F.3d 494, 500 (5th Cir. 2005). At his trial, Jalil Abdul-Kabir (*né* Ted Calvin Cole) introduced evidence of his traumatic background. The court below found that Cole had had "a very rough, rugged childhood," "a bad, very painful background," and that he "never felt loved or worthwhile in his life." *Id.* Other evidence introduced at trial included: (1) Cole's mother was an alcoholic who was unable to care for her children; (2) Cole's father deserted the family when Cole was five years old, dropping Cole off a block from where he thought Cole's mother lived, never to be heard from again; (3) Cole's mother then moved with her children to her parents' home; (4) Cole's grandparents were alcoholics who did not want the children to live with them; (5) Cole was placed in a children's home at the age of five; (6) during Cole's five years in the home, his mother visited him only twice; and (7) Cole's father never visited him at the home. *Id.*

[3] *See* Petition for Writ of Certiorari, *Brewer v. Dretke*, No. 05-11287, at 3-4 (May 30, 2006). Brent Ray Brewer introduced evidence of extensive childhood abuse at the hands of his father, who suffered from Post-Traumatic Stress Disorder due to his military service during the Vietnam War. *Id.* Brewer presented evidence that he did not know his father until he was fifteen years old, and that he and his mother were abused by him. *Id.* He was beaten by his father with various objects, including the butt of a pistol and a flashlight. *Id.* Three months before the incident for which Brewer was prosecuted for murder, he was involuntarily committed to a psychiatric hospital in response to suicide threats. *Id.* It was there he met his co-defendant who managed to control and manipulate him. *Id.*

defendant's acts and the likelihood that the defendant would be a further danger to society.[4]

Abuse of and violence against children and adolescents is understood to occasion great harm on developing youth. This understanding is reflected in the capital jurisprudence of this Court; the actions of the federal and state legislatures; and in the literature, film, and music in our culture. The potential harm from victimization in youth is understood to increase the chances that a person so damaged may act out violently as an adult, as opposed to others who do not share a similar experience in childhood or adolescence. Such a cycle of violence is both aggravating, in that it makes an individual more likely to be dangerous in the future, and mitigating, as it offers a well-understood explanation for behavior that other violent actors cannot claim.

The Fifth Circuit has again misinterpreted the Court's capital jurisprudence as expressed in *Penry I*, *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) and *Tennard v. Dretke*, 542 U.S. 274 (2004). These cases, taken together, indicate that the jury in a capital case must be allowed an adequate vehicle for consideration of such relevant mitigating evidence. Because no such procedure existed in the capital sentencing trials of Mr. Abdul-Kabir and Mr. Brewer, their sentences of death cannot be considered an

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[4] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071. ("Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment . . . [o]n conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.").

accurate or fair determination of their appropriate punishments.

ARGUMENT

I. EVIDENCE OF A DISRUPTED CHILDHOOD OR ADOLESCENCE – INCLUDING EVIDENCE OF CHILD ABUSE, NEGLECT, DOMESTIC VIOLENCE, AND MENTAL ILLNESS – IS RELEVANT MITIGATING EVIDENCE AS TO PUNISHMENT IN A CAPITAL CASE.

> *[W]hen families are wracked by violence and abuse, values are corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness. . . . **Domestic violence damages children.** Thousands of children have been scarred by violence in their homes. Sometimes they are terrified witnesses of abuse; and sometimes they are the victims. But always, these children absorb messages of violence. And all too often, these messages are transmitted to the next generation. Violence begets violence, and the cycle of domestic abuse continues, generation after generation.*
>
> – Attorney General John Ashcroft[5]

This Court well understands the long-lasting harm that may result from adverse conditions in a young person's formative years:

> A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster

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[5] Prepared Remarks, Annual Symposium on Domestic Violence (October 29, 2002) (transcript available at http://www.usdoj.gov/ovw/nac/agremarks.htm).

> home to another with no constancy of love, trust, or discipline.

Santosky v. Kramer, 455 U.S. 745, 788 (1982) (Rehnquist, J., dissenting).

Youth and adolescence are the times in life when personalities are formed, values are instilled, and character is shaped. When the home environment is a place of uncertainty and terror rather than one of stability and guidance, a person's development is severely impaired, and individuals can understandably suffer the ill effects of such a disrupted development phase long into adulthood. Should a child so harmed during youth end up in trouble with the law as an adult, the evidence of such a disrupted childhood or adolescence – including evidence of child abuse, neglect, domestic violence, and mental illness – is unquestionably relevant mitigating evidence as to punishment. The mitigating value of such evidence flows from the understanding that a youngster so harmed may be more likely to act out in an antisocial way as an adult, and is therefore less morally culpable for the criminal act than a person who did not suffer such harm at others' hands. The mitigating value of such evidence is powerful whether it relates to an attempt to understand a young person's substance abuse, or the root causes of a capital murder.

This Court has long recognized that sentencing determinations require "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937). This is never more true than in a capital case, because the irreversible nature of the death penalty requires that it be imposed only if, during the sentencing process, convicted persons are considered as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

The accuracy of a sentence of death is dependent on procedures that ensure that jurors in capital cases must take into consideration the "character and record of the

individual offender and the circumstances of the particular offense." *Id.* The procedures that insure the consideration of the unique aspects of a person charged with a capital offence are a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

In *Lockett*, this Court discussed the mitigating value of evidence of youth *qua* youth. *See Lockett,* 438 U.S. 586. In striking down the Ohio sentencing statute as unconstitutional, the Court held that under that scheme, "consideration of a defendant's comparatively minor role in the offense, *or age*, would not generally be permitted, as such, to affect the sentencing decision." *Id.* at 610 (emphasis added). *See also Johnson v. Texas*, 509 U.S. 350 (1993) (presenting issue whether the unadorned special issues adequately allowed jurors to consider mitigating evidence of youth *qua* youth).

However, this Court has held that it is not simply a question of relative youth or age that is relevant to the sentencing decision in a capital case. Rather, the formative events and aspects of a capital defendant's childhood and adolescence are also evidence relevant to the question of the appropriate punishment. For example, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court reversed the sentence of death based on the sentencer's refusal to consider such aspects of Mr. Eddings' youth:

> Eddings was a youth of sixteen years at the time of the murder . . . . The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. *It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.* . . . Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background*

> *and mental and emotional development of a youthful defendant be duly considered in sentencing.*

Id. at 115-116 (emphasis added).

Additionally, the Court noted that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11. By acknowledging the collective responsibility of society for the development of youth, the Court recognized that without intervention or an external support system, such young people may well be burdened with an inability to grow into mature, law-abiding adults. Such impaired young people are released from dysfunctional homes into a difficult and confusing world, unable to adjust to the demands of everyday life, and in possession of a skewed perspective formed by years of maltreatment.

Evidence of abuse and neglect during a person's formative years is exactly the kind of evidence this Court has traditionally viewed as potentially mitigating. For example, the petitioner in *Hitchcock v. Dugger* introduced mitigating evidence to show that:

> [A]s a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family . . . [and] that his father had died of cancer. . . .

Hitchcock v. Dugger, 481 U.S. 393, 397 (1987). A unanimous Court held that because some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the former statutory list, his sentencing "did not comport with the requirements of . . . *Lockett*," and therefore resentencing was required. *Id.* at 399.

Following *Hitchcock*, this Court decided *Penry I,* in which it held that the former Texas capital sentencing scheme – the very same procedure employed at the trials of both Mr. Abdul-Kabir and Mr. Brewer – provided a constitutionally inadequate vehicle for jurors to consider

and give effect to Penry's mitigating evidence of mental retardation and severe childhood abuse. *Penry I,* 492 U.S. 302; *see also Penry II*, 532 U.S. at 797 (describing "give effect to" language of *Penry I* as "the key" to that decision). Johnny Paul Penry was mentally retarded, having been diagnosed with organic brain damage as a child. *Penry I*, 492 U.S. at 307. The Court found that Penry's brain damage may have been caused by beatings and multiple injuries to his brain at an early age. *Id.* at 308-309. In addition, Penry's sister testified that their mother had frequently beaten Penry over the head with a belt when he was a child, and that he was routinely locked in his room without access to a toilet for long periods of time. *Id.* at 309. Penry was in and out of a number of state schools and hospitals until his father removed him from state schools altogether when he was 12. *Id.* Even the State's psychiatrist testified that Penry "had a very bad life" and had been "socially and emotionally deprived." *Id.* at 309-310.

In striking down the application of the unadorned Texas sentencing structure in Mr. Penry's case, the Court explained that "underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. The Court continued:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that *defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.*"

Id. (emphasis added) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). The Court held that, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty . . . the jury was not provided

with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. Thus, the case was remanded for resentencing to ensure that "the death penalty will [not] be imposed in spite of factors that may call for a less severe penalty." *Id.*[6]

The presentation of evidence regarding the negative aspects of a defendant's childhood and adolescence often serves as a central aspect of the argument for a sentence of life rather than death. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court reversed Mr. Williams' death sentence based in part on the fact that his attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of his trial. The omitted evidence included a description of mistreatment, abuse, and neglect during Williams' early childhood. *Williams*, 529 U.S. at 391-392. Had his attorneys done a proper investigation, the jury would have heard that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[7] that Williams had

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[6] *See also Penry II*, 532 U.S. at 804. In *Penry II*, the Court again addressed the Texas sentencing scheme and once again found it deficient, this time due to an inadequate supplemental jury instruction. *Id.* The Court held that

> [t]he mechanism created by the supplemental instruction . . . inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependant on their willingness' to elevate the supplemental instruction over the verdict form instructions. (citations omitted). There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of Penry's mental retardation and childhood abuse. (citation omitted). The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 800.

[7] *Williams*, 529 U.S. at 395 n.19. Juvenile records contained the following description of Williams home: "The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the

(Continued on following page)

been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Id.* at 395. After hearing the additional evidence developed in the post-conviction proceedings, the judge who presided at Williams' trial and who had previously determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. *Id.* at 396-397.

More recently, this Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Constitution precludes the execution of juveniles. Justice Kennedy, writing for the majority, noted that juveniles "have less control, or less experience with control, over their own environment . . . [t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 U.S. at 569-570. Thus, this Court recognized that juveniles are less blameworthy for failing to escape their unfortunate situations. Those same children who were unable to escape negative influences as children and who were subjected to those influences throughout their formative years may well grow up lacking the skills to mature into self-restraining and law abiding citizens.

In *Roper*, the Court also grappled with the difficulty in differentiating between "the juvenile offender whose crime

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bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on underpants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." *Id.*

reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. The Court noted the professional standards "forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder . . . which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Id.* These juveniles whom psychiatrists are reluctant to label as "antisocial" by virtue of their age are the very individuals that may later go on to commit crimes. Their inability to deal with societal demands does not always evaporate by virtue of a few more years of experience. In fact, additional negative life experiences can solidify the antisocial behavior, which then becomes a permanent aspect of these adults' personalities. Because abused, neglected and disabled children often remain incapable of escaping those negative influences as adults, their crimes are more understandable – and are therefore worthy of lesser punishment – as the product of the harm they suffered when young.

II. THE LINK BETWEEN THE HARM CAUSED BY CHILDHOOD ABUSE AND TRAUMA AND SUBSEQUENT ANTISOCIAL OR CRIMINAL BEHAVIOR IS REFLECTED IN FEDERAL AND STATE LAWS.

Americans have a firm resolve when it comes to violent crime. Most favor stiff punishment for the offender, while expressing compassion for the victims of serious crimes. Yet the issue becomes complicated when one considers that many victimizers were once victims themselves. Although most children who endure abuse or neglect grow up healthy and law-abiding, the exceptions yield a disturbing and widespread irony: When a community fails to

protect a child from harm, it may soon be calling for that young person's head.[8]

Under both state and federal laws, child abuse is considered a serious crime. In 1974, the federal government passed its first law addressing child abuse and neglect, the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. 5101 *et seq.* This Act provides federal funding to states in support of child abuse prevention, assessment, investigation, prosecution, and treatment activities, and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects.[9] CAPTA also sets forth baseline definitions of child abuse and neglect, including both acts and omissions, to guide states in enacting child abuse and neglect reporting laws. In order to receive funding through CAPTA, states must establish a mandatory reporting system for suspected child abuse and set forth minimum punishments for failure to report. Even prior to CAPTA's enactment, almost every state had some system for reporting child abuse or neglect. However, often these reports did not capture incidents of child abuse until after the victim had suffered permanent psychological or physical damage, or even death. *See* H.R. REP. NO. 93-247 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2763, 2765.

CAPTA has been reauthorized numerous times since 1974. Repeatedly, in Congressional reauthorization hearings, legislators have emphasized the severe effects abuse and neglect have on children as they mature. During the 1988 reauthorization of CAPTA, Senator Strom Thurmond of South Carolina stated, "the growth in reported incidents of child abuse, as well as research suggesting that such

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[8] Katherine Winfield & Rodney Albert, *Breaking the Link Between Child Maltreatment and Juvenile Delinquency*, CHILDREN'S VOICE, Child Welfare League of America, Mar. 2001, http://www.cwla.org/articles/cv0103breaklink.htm (last visited Nov. 26, 2006).

[9] *See* U.S. Department of Health and Human Services, Child Welfare Information Getaway, *About CAPTA: A Legislative History*, Dec. 2004, http://www.childwelfare.gov/pubs/otherpubs/about.pdf (last visited Nov. 26, 2006).

abuse may have *long-term negative results for both the child and society*, have increased concerns regarding the prevention of child abuse, and treatment for abused children." 134 CONG. REC. S3468-02 (daily ed. March 30, 1988) (statement of Sen. Thurmond) (emphasis added). Another legislator, Representative William Goodling of Pennsylvania, shared this view, citing some of the long-term effects caused by childhood abuse: "[T]hese children are our future. Unless they are helped, *unless the abuse and neglect is stopped, they will be ill prepared to meet the daily challenges of living*. Their self-esteem will be low; they will be at great risk of educational failure; they might become runaways; and *they will probably grow up to be adults who abuse their children*." 134 CONG. REC. E10334-02 (daily ed. April 12, 1988) (statement of Rep. Goodling) (emphasis added).

Many legislators expressed their understanding that children who suffer from abuse and neglect are more likely to act in unlawful ways as they grow older. For example, Representative Major Owens of New York emphasized the need for child abuse prevention to protect children from such a fate: "[I]t is common for abused children to blame themselves for the pain they have suffered. Other children who aren't fortunate enough to receive therapy *go on to become abusers of others as well as themselves and possibly turn to crime*." 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens) (emphasis added). Many legislators cited the need for child abuse prevention measures based on the well-established research that shows that children who suffer from abuse in the home are more likely to abuse their own children when they become parents.[10] Representative Lloyd articulated other

[10] *See, e.g.*, 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Marilyn Lloyd of Tennessee) ("There is some evidence that children who are abused are more likely than non-abused children to become abusers, creating a cycle of abuse through generations of families."); *Group for Children Aims to Break Cycle of Abuse*, N.Y. TIMES, May, 31, 1987 at Section 1, p. 42, Column 3 ("About 80 percent of batterers grew up in abusive families.") (cited in 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens)).

repercussions of child abuse stating, "some victims of child abuse have been found to exhibit physical trauma. Child abuse may manifest itself in both short and long term problems such as emotional and learning disorders, poor school performance, and in suicidal and delinquent behavior." 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Lloyd).

In the most recent reauthorization of CAPTA, consideration of the long-term effects of the harm occasioned by child abuse and neglect led Congress to amend CAPTA to extend the circumstances under which child abuse must be reported. Reports are now required even where child abuse is only reasonably *suspected,* rather than *known. See* Keeping Children and Families Safe Act of 2003, Pub. L. 108-36 Sec. 114 (increasing funding and training opportunities for public education on the role and responsibilities of the child protection system and basis for reporting suspected incidents of child abuse and neglect).

In accord with CAPTA, all fifty states, the District of Columbia, and Puerto Rico have some form of mandatory child abuse and neglect reporting law that specifies mandatory reporters of child maltreatment and dictates the circumstances under which they are to report. These laws typically require persons to report to some type of law enforcement authority or child protection agency when they have reasonable cause to suspect or believe that a child has been abused or neglected, or have knowledge of, or observe a child being subjected to, conditions that would reasonably result in harm to the child. As Representative Owens recognized in 1988, "[c]hild abuse is probably not on the increase necessarily in this country, but the reporting of child abuse is increasing. That is *a sign of the evolution of our society, the fact that we take more seriously these crimes against children.*" 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Owens).

Moreover, many states have broad mandatory reporting statutes that require *all persons* to report child abuse, in lieu of or in addition to requiring certain specified professionals or institutions to report child abuse. For example, Texas requires

"*a person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report." TEX. [FAM.] CODE ANN. § 261.101(a) (emphasis added).[11] Other states only require certain specified individuals – frequently professionals such as social workers, school personnel, health care workers, mental health professionals, child care providers, medical examiners/coroners, and law enforcement officers – or institutions to report child abuse. Yet even in those states with narrower reporting requirements, legislative change is underway. For example, in 2003, Oregon amended its definition of "public and private officials" in its mandatory reporting statute to include legislators among the individuals who must report child abuse. *See* OR. REV. STAT. § 419B.005(3)(t) (including "Member of the Legislative Assembly" in the definition of public or private individual"); *see also* OR. REV. STAT. § 419B.010 (requiring "[a]ny public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made"). In a similar vein, some states that do not require all persons to report child abuse nevertheless include members of the clergy in their designated group of mandatory reporters, and provide no exception for the clergy-penitent privilege as grounds for failing to report suspected child abuse or neglect. *See, e.g.,* W. VA. CODE § 49-6A-2 ("When any . . . *member of the clergy* . . . has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately . . . report the circumstances or cause a report to be made."); W. VA. CODE § 49-6A-7 ("The privileged quality of communications . . . between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or

[11] For additional examples of broad state mandatory reporting statutes that require all persons to report child abuse, see Appendix B.

known child abuse or neglect.").[12] These broad mandatory reporting statutes reflect society's recognition that child abuse reporting is essential to prevent child abuse and protect children from its grave long-term effects.[13]

Additionally, in July 2006, Congress enacted further federal law protections in The Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). The Adam Walsh Act includes several provisions intended to prevent child abuse and to protect children from sexual exploitation and violent crime. This further reflects society's acknowledgment that child abuse has grave harmful effects on children and therefore perpetrators of child abuse should be harshly penalized. In particular, the Act increases current sentences for both the commission of crimes against children and the failure to report abuse. For example, the Act amended 18 U.S.C.A. § 2258 to increase the federal criminal penalty for the failure to report child abuse from a maximum of six months imprisonment (the punishment imposed for a Class B misdemeanor under 18 U.S.C.A. § 3581(b)(7)) to a maximum of one year imprisonment (the punishment imposed for a Class A misdemeanor under 18 U.S.C.A. § 3581(b)(6)) and/or a fine.[14] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209,

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[12] For additional examples of state mandatory reporting statutes that require clergy members to report child abuse and provide no exception for the clergy-penitent privilege, see Appendix C.

[13] *See* Child Welfare League of America, Press Release, *CWLA Calls for Federal Law to Make All Members of Congress Mandatory Reporters of Child Abuse and Neglect*, Oct. 3, 2006, http://www.cwla.org/newsevents/news061003congress.htm (last visited Nov. 26, 2006). At the federal level, in October of 2006, the Child Welfare League of America called for a federal law to require all members of Congress to report child abuse and neglect when they learn of it. *Id.*

[14] 18 U.S.C.A. § 2258 (West 2006). The statute relies on the definition of child abuse set forth in the Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 226 (c)(1), 104 Stat. 4789, 4806 (1990), which includes "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."

120 Stat. 587, 615 (2006).[15] The Act also imposes mandatory minimum terms of imprisonment for specific violent crimes against children, including murder, kidnapping, violence resulting in serious bodily injury, and violence with the use of a dangerous weapon. *See id.* § 202 (amending 18 U.S.C.A. § 3559).[16]

In addition to imposing harsher criminal penalties for offenses against children, the Act eliminated statutes of limitation for the prosecution of felony sex offenses involving a minor. *See id.* § 211 (adding 18 U.S.C.A. §§ 3299 & 3281). The Act also makes it easier and more advantageous for victims of certain sex-related crimes against minors to seek civil remedies by revising federal provisions to allow adults as well as minors to sue for injuries and to increase the minimum level of damages from fifty thousand dollars ($50,000) to one hundred fifty thousand dollars ($150,000). *See id.* § 707 (amending 18 U.S.C.A. § 2255).

This Court has stressed that these laws are attempts to address actual harms perpetrated upon children rather than simply criminalizing adult behavior. For example, the Court recognized that the legitimate purpose of child pornography laws is to protect child victims who are exploited and harmed by their participation in the production of pornographic images. In *Ashcroft v. Free Speech*

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[15] *See also* Pub. L. No. 109-248 § 215 (amending 18 U.S.C.A. § 1153(a) to include the crime of felony child abuse or neglect as a crime punishable within the Indian country).

[16] *See* Pub. L. No. 109-248. The Act increased the mandatory minimum terms of imprisonment and criminal penalties for various sexual offenses against children. Pub. L. No. 109-248 § 203 (amending 18 U.S.C.A. § 2422(b) regarding penalty for coercion and enticement of children to engage in prostitution); Pub. L. No. 109-248 § 204 (amending 18 U.S.C.A. § 2423(a) regarding penalty for transportation of child to engage in prostitution); Pub. L. No. 109-248 § 205 (amending 18 U.S.C.A. § 2242 regarding penalty for sexual abuse), Pub. L. No. 109-248 § 206 (amending 18 U.S.C.A. §§ 2241, 2244, 2245, 2251, 2252, 2252A, 2252B, 2260, 3559 & 3592 regarding penalties for sexual abuse and contact), Pub. L. No. 109-248 § 207 (amending 18 U.S.C.A. § 2243(b) regarding the penalty for sexual abuse of wards), Pub. L. No. 109-248 § 208 (amending 18 U.S.C.A. § 1591(b) regarding mandatory penalties for sex-trafficking of children).

Coalition, 535 U.S. 234 (2002), this Court affirmed a ruling by the United States Court of Appeals for the Ninth Circuit striking the federal Child Pornography Prevention Act of 1996 ("CPPA") as overbroad, in violation of First Amendment free speech rights. CPPA "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear[ed] to depict minors but were produced without using any real children," such as images created by using adults who look like minors or by using computer imaging. *Id.* at 239-240.

The Court struck down the CPPA in part because the "virtual child pornography" images banned by the statute did not involve children in the production process. Therefore, the images were not the product of child sexual abuse that the state had an interest in stamping out without regard to judgment regarding its content. *Id.* at 241. Because no actual children are involved, the images did not record any crime, nor did they create any victims by their production. *Id.* at 250. It is the harmful effect on the children who are exploited in the creation of child pornography that warrants affording child pornography no First Amendment protection. *See, e.g., id.* at 244 ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people.").

III. JURORS MUST BE GIVEN A VEHICLE FOR EXPRESSING THEIR REASONED MORAL RESPONSE TO RELEVANT MITIGATING EVIDENCE OF YOUTHFUL VICTIMIZATION.

Jurors face an extremely serious and difficult decision when determining the appropriate sentence in a capital case. Although the decision is guided by law, it is also dependent upon the facts of the case and the circumstances of the offender. Each juror brings their own experience and understanding regarding human nature to that decision. Part of that understanding includes the accepted concept that victims of childhood violence may become perpetrators of violence as adults. That knowledge of human nature also makes such evidence mitigating, as it suggests a reason for criminal behavior not available to

others who were not so traumatized. Capital sentencing structures must allow jurors an opportunity to express that belief, which is based in society's common experience.

A. Jurors' Widely Held Notion that Childhood Abuse and Trauma Are Often Catalysts for Adult Acts of Violence Is Reflected in Popular Literature, Films, Television and Music.

> *I and the public know*
> *What all schoolchildren learn,*
> *Those to whom evil is done*
> *Do evil in return.*[17]

Before they are seated in the jury box, jurors in capital cases are citizens who access a wide range of historical, societal and cultural information. Media sources that inform and shape jurors' perceptions permeate our society and reflect common wisdom. One such inescapable message that jurors understand before they enter the courthouse is that children who suffer childhood abuse or trauma are more likely to act out violently as adults. This cycle of violence, in which childhood victims of abuse and trauma are transformed into violent adults, is frequently portrayed in popular culture to explain the violent or antisocial behavior of adult characters.

The audience of such portrayals in literature, film, and television – future jurors – are left to decide for themselves whether the characters' violent backgrounds diminish their culpability or make them irretrievably evil. A similar role is performed by the jury in a capital proceeding, where evidence of such childhood abuse can be a two-edged sword. *See Penry I*, 492 U.S. at 324. Such evidence can be seen as both aggravating and mitigating, and it is incumbent on the jurors to properly weigh the relative value of each side of this sword in any given case. Under Texas' former sentencing scheme, jurors

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[17] W.H. AUDEN, *September 1, 1939*, *in* COLLECTED POEMS 86 (Edward Mendelson ed., 1991) (cited in Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. 367 (2005) (discussing the "cycle of violence" that transforms victims into perpetrators).

were not given any vehicle for considering the mitigating aspects of evidence demonstrating abuse, neglect and violence during the defendant's youth. Instead, they were required to reduce a multifaceted portrayal of the defendant's life and background to a yes or no answer in response to a question of future dangerousness.

The cycle of violence is often invoked to explain and predict the violent behavior of the protagonists/antagonists in literature, film, television and song lyrics. In suspense and horror films, adult characters who commit violent acts are often depicted as having suffered extremely traumatic childhoods marred by abuse, neglect, and psychological torture.[18]

Not all portrayals of the cycle of violence in film are severe. In *Good Will Hunting*, the protagonist, Will Hunting, is a mathematical genius who is repeatedly incarcerated for his violent and antisocial tendencies. Will is ordered to attend therapy, and through his treatment, he confronts his abusive youth in which he was victimized first by his father and then by his foster father:

> *Will*: My father was an alcoholic. Mean f***in' drunk. Used to come home hammered, looking to whale on someone. So I had to provoke him, so he wouldn't go after my mother and little brother. Interesting nights were when he wore his rings . . . .
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> * * *

[18] In Alfred Hitchcock's iconic 1960 suspense film, PSYCHO, the main character, Norman Bates, endures years of physical, emotional, and sexual abuse by his mother until he finally kills her and her lover. As an adult, he develops severe psychosis, adopting the persona of his deceased mother and committing three murders. PSYCHO (Paramount Pictures 1960); *see also* A NIGHTMARE ON ELM STREET (New Line Cinema 1984) (Freddy Krueger is conceived by rape and given up for adoption at birth, then is placed in foster care with an abusive alcoholic man who ultimately adopts him. In adulthood, Freddy kills his adoptive father and commits a series of child murders); STAR WARS EPISODE I – THE PHANTOM MENACE (Twentieth Century Fox 1999) (Darth Vader is enslaved as a child, along with his mother. His mother is killed before his eyes and he ultimately turns to "the dark side.").

> *Will (referring to his foster father):* He used to just put a belt, a stick, and a wrench on the kitchen table and say, "Choose."

GOOD WILL HUNTING (Miramax 1997).

In the films described above, the filmmakers depicted acts of violence committed by adults who suffered childhood abuse. Other filmmakers have used childhood abuse as the backdrop for a story of an adult who seeks vengeance against his or her childhood abuser, or a suspected child abuser.[19] In addition, several filmmakers have dramatized the real-life stories of individuals who were abused as children and subsequently engage in violent behavior as adults.[20]

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[19] *See, e.g.*, MYSTIC RIVER (Warner Bros. 2003) (portraying a man who is sexually abused as a child and who, in adulthood, kills a man who he believes is going to abuse a young child); SLEEPERS (Warner Bros. 1996) (depicting children who were routinely physically and sexually abused by guards in a detention facility and who, in adulthood, seek revenge by murdering one of the guards. *Cf. Lost: What Kate Did* (ABC television broadcast, Nov. 30, 2005) (depicting a woman, Kate, who sets fire to her parents' home, intentionally murdering her alcoholic and physically abusive father).

[20] *See, e.g.*, ANTWONE FISHER (Twentieth Century Fox 2002) (depicting a navy sailor sent to a naval psychiatrist for help after a series of violent outbursts, where he confronts a painful past of abuse at the hands of his foster family.); *see also* Stephen Holden, Film Review: *A Director And His Hero Find Answers In the Details*, N.Y. TIMES, December 19, 2002 ("In one scene the young Antwone, his hands tied, is savagely beaten with a wet dish towel for supposedly dirtying the walls. In another, she menaces the boy with a flaming torch made from a rolled-up newspaper."); MONSTER (Columbia Pictures 2003) (telling the story of Aileen Wournos, a young woman who as a child was neglected and abandoned by her mother, and left in the care of alcoholic grandparents who physically, emotionally, and sexually abused her. After committing a series of minor crimes, Aileen hitchhikes to Florida where she is tried, convicted, and subsequently executed for killing seven men whom she claimed tried to rape her while she was working as a prostitute.); Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. at 370-73, 382, 393 (focusing on the case of Aileen Wournos; arguing that "people to whom terrible things are done and people who do terrible things . . . are often the same people"; and asserting that "among those who have committed

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Like filmmakers, novelists and playwrights also employ the cycle of violence in their exploration of the complicated pasts of their violent characters. Toni Morrison's Pulitzer Prize-winning novel *Beloved* traces the tragic history of an escaped slave named Sethe who is viciously abused, both physically and sexually, during her childhood and adolescence in slavery. When the slave hunters come looking for her, Sethe kills her infant child to prevent her from being sold into slavery, and attempts to kill her other child. TONI MORRISON, BELOVED (Alfred A. Knopf, Inc. 1987). In *The Lovely Bones*, the antagonist, George Harvey, watches three men attack his mother in their home when he is five years old. His mother then takes George to escape and runs over the three attackers, killing them. Shortly afterward, George witnesses his father kill his mother. Seeing these acts of violence provokes a deep hatred of women, and by his mid-30s, George has killed a dozen women and girls. ALICE SEBOLD, THE LOVELY BONES (Little, Brown & Company 2002).

Popular playwright Martin McDonagh has also used the cycle of violence as a theme in his play, *The Pillowman*. In *The Pillowman* the main character, Katurian, is a short story writer whose bizarre stories begin to come true. As a child, Katurian discovers that his brother, Michal, whom he never knew existed, was living in his house and was routinely tortured by his parents. In an effort to save his brother, Katurian smothers his parents with pillows, killing them both. However, the years of torture left Michal

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serious crime, it is the rare perpetrator who has not also suffered. It is the rare death row inmate whose life does not read like a case study of extreme deprivation and abuse. It is the rare juvenile incarcerated in an adult prison for rape or murder who has had anything other than the cruelest of childhoods . . . [I]t is well documented that [abused and neglected] girls grow up to become the vast majority of women in prison.") (citing Phyllis Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 986-87 (1998); James Garbarino, *Children in Danger: Coping With the Consequences of Community Violence* (1992); and Cathy S. Widom & Michael G. Maxfield, Nat'l Inst. of Justice, *An Update on the Cycle of Violence* (Feb. 2001)).

severely mentally impaired. Many years later when Katurian and Michal are brought to the police station for questioning about a series of murders that mirror Katurian's short stories, Michal confesses to Katurian that he indeed copied Katurian's stories and murdered two children. MARTIN MCDONAGH, THE PILLOWMAN: A PLAY (Faber & Faber 2004).[21]

Songwriters also introduce themes of childhood violence to explain pain and violence in their songs. In her song, *He Never Got Enough Love*, Lucinda Williams depicts the destructive consequences of years of psychological, emotional, and physical child abuse. A young boy is abandoned by his mother at an early age and is left with his alcoholic and abusive father, who routinely verbally and physically abused him. When the child enters adulthood, he takes out his own anger out on a stranger, seeking to prove correct his father's negative perception of him. LUCINDA WILLIAMS, *He Never Got Enough Love, on* SWEET OLD WORLD (Chameleon Records 1992).

Further, television series provide possibly the broadest examples of society's understanding of the cycle of violence. For example, on *Lost*, one of television's most popular series, one of the main characters, Sawyer, is a petty criminal whose past history of child abuse is used to explain his adult behavior. When Sawyer was a child, his mother had an affair with a man who would eventually con Sawyer's family out of their life savings, prompting Sawyer's father to murder his mother and then commit suicide. When Sawyer gets into financial trouble as an adult, he turns to a life of con artistry and murders a man

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[21] Even the critic who reviewed the play recognized the prevalence of the cycle of violence as a theme: "McDonagh shows that often abused children grow up to be miserable adults. He has Katurian write about a hero, the Pillowman, who offers abused children a way out by enticing them to suicide to spare them a life of despair." Tom Williams, *Sadistic Tale of Storytelling Shocks us to the Core*, CHICAGO CRITIC.COM, September 23, 2006, http://www.chicagocritic.com/html/the_pillowman.html (last visited Nov. 26, 2006).

whom he suspects was his mother's former lover. *Lost: Outlaws* (ABC television broadcast, Feb. 16, 2005).[22]

What jurors learn from the cultural references to which they are exposed every day is that abused children and adolescents may grow up to become violent adults. However, they are often led to understand that, by influence of that trauma and harm in youth, a person so abused in childhood is not as morally culpable for criminal acts as one with no such violent past.

There can be no dispute that such evidence is relevant to the sentencing determination in a capital case. When asked to weigh the option of life or death for these victims of childhood abuse, jurors must be given a vehicle for expressing their decision that a particular act of violence may be the product of a damaged, rather than depraved, psyche. However, Texas' former "special issues" only permit the jurors to give effect to the relevant *aggravating* aspects of such evidence through their answer to the question whether the petitioners probably would constitute a "continuing threat to society." Thus, the instructions effectively require the jurors to interpret all aspects of the evidence of childhood abuse and trauma only as aggravating and foreclose any consideration of the equally compelling mitigating aspects of such evidence.

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[22] Violent adolescents are also portrayed as victims of childhood abuse on television. The widely popular television series *Buffy the Vampire Slayer* features Buffy Summers, a young woman chosen by fate to hunt and kill vampires. In one episode, Buffy mistakes her classmate, Cordelia, for a vampire. Wielding a makeshift stake, Buffy pushes Cordelia up against the wall. When Buffy sees that she has mistakenly attacked Cordelia, and when she lets her go, Cordelia responds, "God! What's your childhood trauma?" *See Buffy the Vampire Slayer: Welcome to the Hellmouth* (WB television broadcast, May 10, 1997) (transcript available at www.buffyology.com/transcripts/001-1-01-welcometothehellmouth.html); *see also* John Harlow, *Throw Off Your Anoraks and Rejoice*, N.Y. TIMES, January 11, 2004 (describing the quotation regarding childhood trauma as having "entered dictionaries of pop-culture quotations").

B. The Fifth Circuit's Continued Restrictions on the Type of Evidence Deemed "Relevant" to the Capital Sentencing Decision Violate this Court's Precedents.

This Court recently rejected the Fifth Circuit's "constitutional relevance" test, which placed limitations on the consideration of relevant mitigating evidence in the Texas capital sentencing context. *See Tennard*, 542 U.S. 274; *see also Smith v. Texas*, 543 U.S. 37, 43-44 (2004) (rejecting similar "threshold test" for mitigating evidence). In so doing, the Court plainly defined the broad range of mitigating evidence relevant to the question of punishment:

> When we addressed directly the relevance standard applicable to mitigating evidence in *McKoy v. North Carolina*, 494 U.S. 433 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context. . . .

Tennard, 542 U.S. at 284 (quoting *McKoy*, 494 U.S. at 440). For mitigating evidence to be considered relevant, it need only have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting FED. R. EVID. 401). Judge Dennis, dissenting from the denial of the motion for rehearing en banc in Mr. Abdul-Kabir's case, articulated the standard:

> In *McKoy v. North Carolina* . . . , the Court reaffirmed or clearly established that the principle of relevance under Federal Rule of Evidence 401 applies in capital cases and cannot be distorted by the state so as to interfere with the sentencer's full consideration and use of relevant evidence in culpability assessment and sentence selection.

Cole v. Dretke, 443 F.3d 441, 446 (5th Cir. 2006) (citation omitted) (en banc reh'g denied) (Dennis, J., dissenting from denial of reh'g).

Prior to this Court's correction in *Tennard*, however, the Fifth Circuit utilized a test for "constitutional relevance" which it characterized as a "screening test" for mitigating evidence. *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003).[23] In *Tennard*, this Court stated that the Fifth Circuit's "constitutional relevance" test "has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Tennard*, 542 U.S. at 284. Not only did the test lack the support of this Court's precedent, but it had the detrimental effect of screening out mitigating evidence that was obviously relevant in a capital sentencing proceeding. *Id.* at 285-86.

Despite this Court's rejection of the "constitutional relevance" test in *Tennard*, the Fifth Circuit continues to employ the functional equivalent of the test in its evaluation of mitigating evidence. This is particularly noticeable in *Brewer* when the lower court, in discussing mitigating evidence presented at Brewer's trial, notes a "constitutional distinction between, on the one hand, 'severe' abuse of the type Penry sustained and, on the other, a 'mere' troubled childhood of the sort Graham experienced." *Brewer v. Dretke*, 442 F.3d 273, 279 n.16 (5th Cir. 2006). The court continued, "there does not appear to be one iota of evidence suggesting either that Brewer's condition is permanent or that he experienced cognitive limitations of any sort as the result of it." *Id.* at 281.

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[23] The lower court's previous test required a petitioner to show that (1) he had a "uniquely severe permanent handicap" acquired through no fault of his own, and (2) there was a nexus between the offense and the petitioner's "severe permanent condition." *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995), *overruled in part by Tennard*, 542 U.S. at 282-84. As to the first requirement, the Fifth Circuit explicitly stated that the mitigating evidence must relate "either to severe mental retardation or extreme child abuse." *Smith v. Cockrell*, 311 F.3d 661, 680 (2002). The second requirement was a "nexus requirement," calling for a connection between the offense committed and the condition to which the mitigating evidence refers. *Id.* at 680-81.

The Fifth Circuit's resurrection of its "constitutional relevance" test again allows for a closed-door approach to the relevance of mitigating evidence. As Judge Dennis reiterated:

> Cole's moral culpability was a factor of consequence to the outcome of the sentencing proceeding. Cole's evidence of his organic neurological defect, lack of impulse control, and destructive family background was relevant mitigating evidence, as the Cole panel concedes, because it made it more likely that the jury would assess Cole with a lower level of culpability than it would have without that evidence. The panel does not dispute, but tacitly admits, that the State failed to comply with its duty and responsibility to empower and allow the sentencing jury to fully consider and fully give effect to Cole's relevant mitigating evidence by assessing his culpability and selecting his sentence on the basis of that evidence and assessment.

Cole, *supra*, 443 F.3d at 449.

This Court has long held that the statutory means employed to enable jurors to consider mitigating evidence may differ. *See, e.g. Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469, 472 (2006) (upholding California catchall provision instructing jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" as adequate vehicle for consideration of mitigating evidence).[24] However,

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[24] In *Belmontes*, the Court reaffirmed its previous holding that States are free to "structure and shape consideration of mitigating evidence," in order to achieve "a more rational and equitable administration of the death penalty." *Boyde v. California*, 494 U.S. 370, 377 (1990). States certainly retain a strong interest in assuring that the sentencer's decision is rational rather than purely emotional or arbitrary. This conclusion is apparent from the types of "structuring" and "shaping" devices this Court has approved; for example, the Court has endorsed instructions requiring the jury to "render its decision on the evidence without sympathy," *Saffle v. Parks*, 494 U.S. 484, 490 (1990) or to avoid the influence of, *inter alia*, "public opinion or public feeling." *Brown*, 479 U.S. at 539. Neither practice circumscribes the

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the Court has never approved a system which constrains the admissibility or consideration of mitigating evidence based on harsh relevance standards. Indeed, this Court has always understood that it is the function of the sentencer to determine the weight of evidence and that determination cannot be taken from them by action of the state or courts. For example, in *Eddings*, this Court held that the sentencer is entitled to determine the weight to be given to mitigating evidence in deciding whether a defendant should be sentenced to death. *See Eddings*, 455 U.S. at 113-14 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").[25]

A similar issue regarding the limitation of relevant evidence was presented in *Skipper v. South Carolina*, 476 U.S. 1 (1986). In that case, the trial judge held that Mr. Skipper's evidence that he would adjust well to prison

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jury's ability to assess the mitigating significance of the defendant's evidence in a given case. Nor does either rule preclude the jury's ultimate moral judgment that death is an excessively harsh sentence for a particular defendant, in light of his reduced culpability. Indeed, precisely because the sentencer's response should be *reasoned* and *moral*, States may prevent jurors from deciding capital cases on mere whim or sympathy.

[25] In *Eddings*, Justice Powell's opinion for the Court characterized the decision of the Oklahoma Court of Criminal Appeals as holding that Mr. Edding's mitigating evidence was "not relevant." 455 U.S. at 113. Conversely, Justice Powell held that the evidence *was* relevant:

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation . . . In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Id. at 115.

"would be irrelevant and hence inadmissible." *Id.* at 3. Similarly, the State argued that mitigating evidence of past good conduct in jail was relevant only to establish good character. Thus, it urged the Court to hold that there was no constitutional violation in excluding the evidence proffered to show "future adaptability to prison life." *Id.* at 6-7. The Court rejected those arguments and held that it was improper to exclude the evidence because doing so would violate the rule that the sentencer may not refuse to consider, nor be precluded from considering, any relevant mitigating evidence that the defendant submits in support of a sentence other than death. *Id.* at 7 (citing *Eddings*, 455 U.S. 104). In reaching that conclusion, the Court held:

> The only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. . . . Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'

Id. at 4-5.

Based on this Court's decisions, it is clear that evidence of adverse events in childhood, like those suffered by Mr. Abdul-Kabir and Mr. Brewer, is the type of mitigating evidence that is relevant to the capital sentencing determination. Nothing in this Court's decisions supports the Fifth Circuit's continued resistance to *Tennard*, *Penry I*, and *Penry II*. All of those cases proceed from the premise that the sentencing authority must be permitted to consider and give effect to whatever relevant mitigating evidence a capital defendant may present. If such evidence is relevant to the future dangerousness inquiry but is potentially mitigating for other reasons, the "future

dangerousness" special issue alone will not enable the jurors to give full effect to the defendant's mitigating evidence. By definition, in such circumstances, the second special issue will restrict the jury's consideration in a way that does not encompass the full mitigating force of the defendant's evidence. This is certainly the case with evidence that a defendant was a victim of childhood abuse and that he is now, as an adult, a participant in the well-understood cycle of violence.

CONCLUSION

Like the evidence in *Tennard, Penry I*, and *Penry II*, relevant mitigating evidence of adverse events in childhood presented by Mr. Abdul-Kabir and Mr. Brewer was a "two-edged sword" which jurors were only allowed to use to cut against the defendant. Because of this unconstitutional limitation on the consideration of relevant mitigating evidence, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST BY *AMICI CURIAE* CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS:

Child Welfare League of America (CWLA) is an 84-year-old association of more than 1000 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. Because we know that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of our work, we strive to ensure that every child and young person is protected from harm, injustice and discrimination and is provided with the opportunity to achieve his or her full potential.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview

of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC has authored or co-authored many amicus briefs in this Court as well as other state and federal courts concerning the rights of children in the adult criminal justice system, and the importance of considering children's development and experience when sentencing them as adults.

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues. *See* NACDL's website at www.nacdl.org.

APPENDIX B

Examples of States With Mandatory Reporting Statutes That Require All Persons to Report Child Abuse, in Lieu of or in Addition to Requiring Certain Specified Professionals or Institutions to Report Child Abuse.

Delaware, DEL. CODE. ANN. tit. 16, § 903 ("*Any other person* who knows or in good faith suspects child abuse or neglect shall make a report") (emphasis added).

Florida, FLA. STAT. § 39.201(1)(a) ("*Any person* who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected . . . shall report such knowledge or suspicion.") (emphasis added).

Idaho, IDAHO CODE ANN. § 16-1605(1) ("*Any . . . other person* having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported.") (emphasis added).

Indiana, IND. CODE § 31-33-5-1 ("*An individual* who has reason to believe that a child is a victim of child abuse or neglect shall make a report") (emphasis added).

Kentucky, KY. REV. STAT. ANN. § 620.030 ("*Any person* who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made.") (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-705(a)(1) ("*A person* in this State other than a health practitioner, police officer, or educator or human service worker who has

reason to believe that a child has been subjected to abuse or neglect shall" notify) (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-704(a)(1) ("Each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State" shall notify).

Mississippi, MISS. CODE ANN. § 43-21-353(1) ("*Any other person* having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately") (emphasis added).

Nebraska, NEB. REV. STAT. § 28-711 ("When *any . . . other person* has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made.) (emphasis added).

New Hampshire, N.H. REV. STAT. ANN. § 169-C:29 ("*Any other person* having reason to suspect that a child has been abused or neglected shall report the same") (emphasis added).

New Jersey, N.J. STAT. ANN. § 9:6-8.10 ("*Any person* having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report.") (emphasis added).

New Mexico, N.M. STAT. § 32A-4-3 ("*Every person* . . . who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately.") (emphasis added).

North Carolina, N.C. GEN. STAT. § 7B-301 ("*Any person* or institution who has cause to suspect that any juvenile is abused, neglected, or dependent . . . or has died as the result of maltreatment, shall report.") (emphasis added).

Oklahoma, OKLA. STAT. tit. 10 § 7103.A.1 ("*Every . . . other person* having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect, shall report the matter promptly.") (emphasis added).

Rhode Island, R.I. GEN. LAWS § 40-11-3(a) ("*Any person* who has reasonable cause to know or suspect that any child has been abused or neglected . . . or has been a victim of sexual abuse by another child shall, within twenty-four (24) hours, transfer that information to the department for children and their families or its agent.") (emphasis added).

Tennessee, TENN. CODE. ANN. § 37-1-403(a)(1) ("*Any person* who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.") (emphasis added).

Texas, TEX. [FAM.] CODE ANN., § 261.101(a) ("*A person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report.") (emphasis added).

Utah, UTAH CODE ANN. § 62A-4a-403(1) ("*When any person* . . . has reason to believe that a child has been subjected to

incest, molestation, sexual exploitation, sexual abuse, physical abuse, or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse, or neglect, he shall immediately notify") (emphasis added).

Wyoming, WYO. STAT. ANN. § 14-3-205(a) ("*Any person* who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, shall immediately report it.") (emphasis added).

APPENDIX C

Examples of States With Mandatory Reporting Statutes That Require Clergy Members to Report Child Abuse and Provide No Exception for the Clergy-Penitent Privilege.

New Hampshire, N.H. REV. STAT. ANN. § 169-C:32 ("The privileged quality of communication between ... any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter.").

North Carolina, N.C. GEN. STAT. § 7B-310 ("No privilege shall be grounds for any person ... failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case.").

Oklahoma, OKLA. STAT. tit. 10, § 7103.A.3 ("No privilege or contract shall relieve any person from the requirement of reporting pursuant to this section.").

Rhode Island, R.I. GEN. LAWS § 40-11-11 ("The privileged quality of communication between ... any professional person and his or her patient or client, except that between attorney and client, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter.").

Texas, TEX. [FAM.] CODE ANN. § 261.101(c) (Texas itself provides that "[t]he requirement to report ... applies without exception to an individual whose personal communications may otherwise be privileged, including ... a member of the clergy.").

West Virginia, W. VA. CODE § 49-6A-7 ("The privileged quality of communications ... between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect").